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Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel
12-16 April 2004

Draft report

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I. Introduction

1. The third session of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, established by the General Assembly in its resolution 56/89 of 12 December 2001, was convened pursuant to paragraph 11 of General Assembly resolution 58/82 of 9 December 2003, with a mandate to expand the scope of the legal protection under the Convention on the Safety of United Nations and Associated Personnel, including, inter alia, by means of a legal instrument. The Ad Hoc Committee met at United Nations Headquarters from 12 to 16 April 2004.

2. In accordance with paragraph 7 of resolution 56/89, the Ad Hoc Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. In addition, pursuant to paragraph 8 of that resolution, the Secretary-General invited the International Committee of the Red Cross to participate as an observer in the deliberations of the Ad Hoc Committee.

3. The Chairman of the Ad Hoc Committee, Christian Wenaweser (Liechtenstein), opened the session of the Ad Hoc Committee.

4. At the 5th plenary meeting, on 12 April 2004, the Chairman informed the Ad Hoc Committee of the departure from New York of two Vice-Chairpersons, Marcelo Vasquez (Ecuador) and Ioana Gabriela Stancu (Romania), as well as the Rapporteur, Daniel Kipkemei Kottut (Kenya). At the same meeting, the Ad Hoc Committee elected Mahmoud Samy (Egypt) to replace Daniel Kipkemei Kottut (Kenya) as its Rapporteur.

5. At its 6th plenary meeting, on 14 April 2004, the Ad Hoc Committee elected Metod Špaček (Slovakia) and Ricardo Luis Bocalandro (Argentina) to replace Ioana Gabriela Stancu (Romania) and Marcelo Vasquez (Ecuador) as Vice-Chairmen. The Bureau was thus composed of the following members:

Chairman:
Christian Wenaweser (Liechtenstein)

Vice-Chairmen:
Mahmoud Hmoud (Jordan)
Metod Špaček (Slovakia)
Ricardo Luis Bocalandro (Argentina)

Rapporteur:
Mahmoud Samy (Egypt)

6. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee. Mahnoush H. Arsanjani, Deputy Director of the Division, acted as Deputy Secretary of the Ad Hoc Committee and Secretary to its Working Group of the Whole. The Codification Division provided the substantive services for the Ad Hoc Committee and its Working Group.

7. At its 5th plenary meeting, the Ad Hoc Committee adopted the following agenda (A/AC.264/L.6):

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Organization of work.

5. Expansion of the scope of the legal protection under the Convention on the Safety of United Nations and Associated Personnel, including, inter alia, by means of a legal instrument.

6. Adoption of the report.

8. The Ad Hoc Committee had before it General Assembly resolution 58/82, the reports of the Ad Hoc Committee on the work of its first and second sessions[1] and the report of the Working Group of the Sixth Committee convened during the fifty-eighth session of the General Assembly (A/C.6/58/L.16). The Ad Hoc Committee also had before it two reports of the Secretary-General (A/55/637 and A/58/187) on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel.

II. Proceedings

9. At its 5th plenary meeting, the Ad Hoc Committee adopted its organization of work and decided to continue its deliberations in a Working Group of the Whole. The Working Group held seven meetings, from 12 to 15 April 2004. At its 7th plenary meeting, on 16 April 2004, the Ad Hoc Committee adopted its report.

10. At the 3rd meeting of the Working Group, on 13 April 2004, delegations were briefed by a representative of the International Committee of the Red Cross on the relationship between the 1994 Convention on the Safety of United Nations and Associated Personnel and international humanitarian law. The briefing was followed by a question-and-answer period.

III. Discussions in the Working Group on measures to expand the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel

A. General comments

11. Delegations expressed their deep concern about the increase in attacks against civilian personnel performing services for the United Nations, including the attack against United Nations headquarters in Baghdad on 19 August 2003. It was observed that stronger actions must be taken against perpetrators of such crimes and that impunity was unacceptable. It was noted that few States had investigated crimes committed against United Nations and associated personnel and prosecuted or extradited the perpetrators. Some delegations recalled that intentional attacks on peacekeepers and humanitarian personnel were included as war crimes under article 8 of the Rome Statute of the International Criminal Court; to enhance the protection

[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 52* (A/57/52) and ibid., *Fifty-eighth Session, Supplement No. 52* (A/58/52).

of United Nations personnel, they urged those States that had not yet ratified or acceded to the Statute to do so.

12. It was generally agreed that the legal protection for United Nations and associated personnel needed to be strengthened under the Convention on the Safety of United Nations and Associated Personnel, taking into account General Assembly resolution 58/82 and Security Council resolution 1502 (2003) specifying certain short-term measures and expressing the determination of the Security Council to issue the declaration of exceptional risk.

13. For some delegations, while the adoption of short-term measures was necessary, they were insufficient since they aimed at strengthening the existing legal regime of the Convention. In their view, the requirement of a declaration of exceptional risk was the most important obstacle to the protective regime of the Convention. Those delegations expressed their support for the revised proposal by New Zealand (see annex, sect. A) which eliminated the requirement of a declaration of exceptional risk and thereby expanded the scope of legal protection offered by the Convention. The point was made that the revised proposal offered a well-balanced compromise between the view of those States that considered the notion of risk a key factor for the application of the Convention and the view of those that argued for dispensing with the requirement of a declaration of exceptional risk. They also observed that the revised New Zealand proposal succeeded in maintaining the integrity of the Convention by providing an instrument that would supplement it and that would be binding only on those States that so agreed. This would assist in obtaining universal participation in the Convention and not disrupt any process of ratification of the Convention.

14. Some other delegations expressed the view that the main problem with the Convention was not inherent to the mechanism of a declaration itself, but to the lack of its implementation. They observed that the General Assembly and the Security Council had stated their readiness to make a declaration of risk and had encouraged the Secretary-General to initiate such a procedure. In addition, the mechanism to initiate the declaration had not been adequately considered and perhaps the Ad Hoc Committee should consider criteria for making such a declaration. For those delegations the strength of the Convention lay in the largest possible acceptance of the Convention and in its implementation. They stated that it was important to examine the reasons for the low number of States parties, especially among host States. In this regard it was noted that the discussions during the previous session of the Ad Hoc Committee had indicated the need to deal with the difficulties posed to host States by the Convention. Reference was also made to the report of the Secretary-General, in which it was stressed that the protective regime of the Convention depended on the willingness of States to fulfil their obligations (A/58/187, para. 28). Support was also expressed for the proposal made by Jordan in the Working Group of the Sixth Committee in 2003 (A/C.6/58/L.16, annex I.B), which retained the notion of risk properly, thus avoiding the use of arbitrarily established lists of operations to determine the applicability of the Convention.

15. It was stated that an expansion of the scope of the Convention would require the establishment of specific conditions for the United Nations operations that were to be covered and the categories of personnel which would be protected. It was also stressed that it was imperative that such expansion provide legal certainty and

clarity in its application for all States. Furthermore, the view was expressed that an expansion of the scope of the Convention must not weaken its legal regime.

16. It was also pointed out that an expansion of the scope of the Convention had to address the concerns regarding article 8 of the Convention on the respective responsibilities of host States and United Nations personnel.

17. A view was also expressed that an expansion of the scope of the Convention amounted to an amendment to the Convention and should thus be undertaken in accordance with article 23 (Review meetings) of the Convention and article 40 (Amendment of multilateral treaties) of the Vienna Convention on the Law of Treaties. In this context, a number of delegations reiterated their view that the New Zealand proposal was not an amendment to the 1994 Convention and was simply an optional protocol leaving the integrity of the Convention intact and supplementing it, and could therefore adequately be addressed by the Ad Hoc Committee. In addition, the revision of the Convention or an amendment to it would involve only States parties to the Convention, while the current proposal would allow for universal participation.

18. Some delegations expressed their willingness to discuss further the proposal regarding the question of the relationship between international humanitarian law and the 1994 Convention (A/C.6/58/L.16, annex I.A).

B. Comments on specific issues

Relation between a possible protocol and the 1994 Convention

19. The delegation of New Zealand stressed that its proposal for an optional protocol would leave the regime of the 1994 Convention intact for those States that preferred to be bound exclusively by its provisions, while allowing States that wished to expand the scope of the 1994 Convention to do so by becoming parties to the protocol as well as to the Convention. It was noted that the draft articles regarding the relationship between the protocol and the Convention were based on the provisions of a counter-terrorism instrument, the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[2]

20. Some delegations supported the approach of having a protocol in the light of its advantage of retaining the regime of the Convention, while allowing others to become parties to the expanded regime; this would not be disruptive for those States in the process of ratifying the Convention, thus encouraging its universality. Furthermore, universal application was an important element of achieving the universality of the Convention. Such an optional protocol would also make it easier for States to become parties to the Convention. It was also stated that some further refinement might be called for in draft article V of the proposal by New Zealand to reflect the requirement that only a State party to the Convention could become a party to the optional protocol.

21. Some other delegations stated that, while there was consensus on strengthening the protection of United Nations and associated personnel, there was no clear

[2] United Nations, *Treaty Series*, vol. 1589, p. 474.

consensus on the best means to achieve that goal. It was also stated that there was a close link between the substance of the discussions on the proposed provisions and the form in which they should be adopted. Therefore, a decision on the final form of any instrument that might emerge from discussions could be made only once agreement was attained on the substantive issues.

22. The view was expressed that, to achieve the enhancement of the scope of legal protection of the Convention, there was also the possibility of elaborating a stand-alone instrument or revising the Convention.

23. With regard to the formulation of draft article V of the New Zealand proposal, the suggestion was made to follow articles 5 and 6 of the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,[3] which allowed States to become bound to the instrument by their signature, if they so wished.

Definition of United Nations operations

24. The delegation of New Zealand, introducing the elements of its revised proposal relating to the definition of United Nations operations, contained in draft article II, explained that it took into account the observations and proposals made during earlier deliberations. The proposal sought to offer a provision that was capable of an objective application and certainty as to which United Nations operations would fall within the expanded scope of the Convention. At the same time, the proposed provision aimed to retain the notion of risk by expanding the application of the Convention only to those operations that were inherently risky to the personnel involved. Consequently, permanent headquarters and offices would not be included in the definition, which was specifically clarified in paragraph 2 of the article. The sponsor further explained that, in order to avoid problems related to defining United Nations operations by lists of names or titles, the definition proposed was based on the purpose of the operation. It was clarified that operations conducted for the purpose of "delivering humanitarian, political or development assistance" would be covered. Thus, a State would know from the mandate of an operation whether or not it was covered by the expanded protective regime.

25. Some delegations expressed support for draft article II of the proposal and emphasized their belief that basing the definition on the purpose of the operation was the most appropriate way to maintain the element of risk in the definition and, at the same time, provide an objective application. It was also stated that the notion of risk was referred to in the third preambular paragraph of the New Zealand proposal, which further served to underline that the element of risk was retained.

26. On the other hand, some other delegations pointed out that draft article II of the New Zealand proposal did not sufficiently reflect the element of risk as a sufficiently relevant criterion for the application of the Convention, especially in view of the fact that the declaration of exceptional risk as a trigger mechanism had been removed. A definition of United Nations operations based on their purpose signified that all operations falling therein would be covered by the protective regime of the Convention whether or not they entailed any risk. Thus, the definition was too broad and needed to be limited by the requirement of risk. It was also stated that the proposal should retain the distinction between "exceptional risk" and "risk",

[3] United Nations, *Treaty Series*, vol. 1678, No. 29004.

as was apparent in the Convention, since, in the view of those delegations, any United Nations operation entails a certain degree of risk.

27. Questions were also raised whether an operation, in order to be covered by the Convention, would need to encompass all three purposes suggested, or if one was sufficient. Questions were also raised as to how to address cases where one or more of the purposes constituted only a minor part of the overall purpose of the operation. It was also stressed that mandates of United Nations operations were often changed and extended over time, which might cause difficulties in applying the suggested approach. It was stated however that a basic factual analysis should dispel any doubts regarding the purpose of an operation.

28. It was observed that the reference to United Nations operations that were established pursuant to "a standing or specific mandate", which had been incorporated into draft article II of the proposal on the basis of the first report of the Secretary-General (A/55/637, para. 30), needed to be clarified. After such a clarification was obtained from the Secretariat, it was generally agreed that the terms could be dispensed within this context and that it would suffice to make a general reference to United Nations operations similar to or identical with that in article 1(c) of the Convention.

29. It was also pointed out that the reference contained in draft article II, paragraph 1, of the New Zealand proposal to operations that were established "consistent with the Charter of the United Nations" gave rise to the question whether United Nations operations could be established otherwise. It was argued that such a reference would require a clarification or could be deleted.

30. Some delegations expressed concern regarding article II, paragraph 2, of the New Zealand proposal on how to determine which permanent United Nations offices were intended to be excluded from the proposed expanded legal regime. It was observed that a permanent office could be located at the same place as an operation that would fall under the expanded scope of the Convention and, owing to that proximity, could be at risk. Conversely, some other delegations expressed support for the text of draft article II, paragraph 2, of the New Zealand proposal. It was observed, however, that the phrase "established in its territory" in that provision might imply that the non-application of the expanded legal regime to permanent United Nations offices only applied to States on whose territory such offices were established, whereas other States parties would remain bound by the obligations; one way of dealing with the issue could be the deletion of that phrase. Some delegations also found the opening clause of paragraph 2 of article II ambiguous and suggested that it be replaced with a simpler text stating that paragraph 1 of the article did not apply in respect of the locations that were identified in paragraph 2.

Responsibilities of host States and United Nations personnel

31. New Zealand indicated that its proposal was intended to clarify the understanding of a balance between the respective responsibilities of host States and personnel engaged in United Nations operations. Furthermore, the proposal sought to dispel concerns expressed by some delegations in relation to the exercise by a host or transit State of its jurisdiction to enforce its national laws over personnel engaged in a United Nations operation where that State was so entitled under status-of-forces, status-of-mission, headquarters or other international agreements relating

to the operation. It was recalled that article 4 of the Convention made specific provision for such agreements.

32. Delegations agreed on the need to ensure that the proposal did not affect the obligations arising under the 1946 Convention on the Privileges and Immunities of the United Nations.

33. The point was also made that the importance of draft article III of the New Zealand proposal could be found in its attempt to address one of the main problems found in the Convention, namely, finding the right balance between the obligations of a host State and those of United Nations personnel. It was stated that the aim of the Convention was to enhance the protection of United Nations personnel and not to grant them privileges and immunities. It was further stated that the expanded scope should not result in overburdening States with obligations additional to those they already faced under the Convention.

34. The point was made that the regime of the 1994 Convention had a shortcoming which needed to be addressed. According to this view, States should have the right to exercise their national jurisdictions over United Nations or associated personnel, unless other existing international obligations, such as the Convention on the Privileges and Immunities of the United Nations, precluded them from doing so. It was also suggested that any reference to article 4 of the Convention in draft article III of the proposal by New Zealand should be dropped. There was a general understanding that draft article III of the New Zealand proposal would not amend article 8 of the Convention, but was simply a clarification of the scope of the new obligations that would arise from a possible optional protocol; accordingly, draft article III would have no bearing upon the integrity of the Convention.

35. Some delegations considered it necessary to clarify article 8 of the Convention, along the lines of draft article III of the New Zealand proposal, but the views differed as to the best means to attain that objective. One suggestion was to reflect the agreement in the report of the Committee or in a General Assembly resolution. Another view was to allow the formulation of a reservation to article 8 of the Convention, as it applied to the expanded scope of the optional protocol in relation to the nationals of that State party, as well as some non-nationals. However, some delegations expressed certain misgivings about resorting to reservations. It was noted that nothing in the current proposal prevented States from making reservations in accordance with the relevant provisions of the Vienna Convention on the Law of Treaties, if they so wished. Yet another view held that no clarification with respect to article 8 of the Convention was warranted.

36. Some concerns were expressed regarding the reference in draft article III to a transit State, while others felt it was important to retain the reference therein since article 5 of the Convention established obligations for a transit State.

Relation to international humanitarian law

37. Costa Rica recalled that its proposal (A/C.6/58/L.16, annex I.A) sought to address the point raised by the Secretary-General in his first report on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (A/55/637, note 3). The proposal sought to clearly delineate the scope of application of the mutually exclusive regimes of international humanitarian law and the protective regime of the Convention. International

humanitarian law regulates conduct during hostilities, so that it would be applicable to United Nations forces that, as combatants, might be subject to legitimate attacks in certain situations, such as in cases of internal armed conflict. For its part, the Convention's regime dealt with the protection of non-combatants. Article 2 of the Convention followed a formalistic approach to determining the applicable regime and did not fully address the different situations which could arise, thus making it necessary to have a provision such as the one proposed.

38. Though at the technical level the best means of addressing the problem would be to amend the Convention, the sponsor was of the view that the proposal could also be incorporated into an optional protocol. In the view of the sponsor, the Committee should endeavour to improve the regime of the Convention and not just deal with the expansion of its scope.

39. Some delegations welcomed the Costa Rican proposal and noted that, in addition to dealing with the situation raised by the first report of the Secretary-General, it was also applicable to situations where certain members of a United Nations operation acted as combatants, even though the operation itself was not established with such a purpose. Irrespective of the issue of expanding the scope of the Convention, situations where the regimes of both the Convention and international humanitarian law might be applicable required consideration. This was also relevant in relation to the optional protocol proposed.

40. It was stated that the Costa Rican proposal, which shared the common objective of attaining legal clarity, raised complex issues. The proposal did not seem to determine how civilian personnel would be protected in a United Nations operation authorized as an enforcement action, making it necessary for the regime of the Convention to continue to be applicable vis-à-vis such personnel. Furthermore, it was felt that the issue of combatants raised by Costa Rica would not fall under the scope of situations envisioned by the optional protocol.

41. The point was made that the Costa Rican proposal might also need to address situations where an offence against a United Nations combatant could be carried out by an individual who was a non-combatant, in the context of a common crime. Furthermore, United Nations personnel with non-combatant status might find themselves becoming combatants, for example if they came under attack.

42. Another view was expressed indicating that, since the issues raised might not be best resolved by means of an optional protocol, it might be preferable for the Ad Hoc Committee to focus first on expanding the scope of legal protection under the Convention and, upon conclusion of that matter, address the relation between international humanitarian law and the Convention.

43. The representative of the International Committee of the Red Cross, Daniel Helle, addressed the Committee on the subject of the relation between international humanitarian law and the Convention, and noted that there were some situations where there might indeed be an overlap between the two regimes.

IV. Recommendation

[To be inserted]

Annex

A. Proposal by New Zealand (A/AC.264/2004/DP.1)

[To be inserted]

B. Proposal by Costa Rica (A/AC.264/2004/DP.2)

[To be inserted]